ORIGINAL

NO. 91-716

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES ARMIN FOWNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Respectfully submitted,

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January, 1992

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES ARMIN FOWNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Whether the weight of "waste" material, which is the by-product of a drug manufacturing process, should be included in the calculation of a defendant's base offense level under federal sentencing guideline §2D1.1.

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NO. _____

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JAMES ARMIN FOWNER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, James Armin Fowner, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, case number 90-2215, United States v. Fowner, is attached in the Appendix.

JURISDICTION

The Tenth Circuit Court of Appeals' judgment that is sought to be reviewed was filed and entered on October 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. §2101(c), this petition is timely filed if it is filed by January 28, 1992.

UNITED STATES SENTENCING GUIDELINE

The provisions of the United States Sentencing Guidelines involved in this case are the following:

Guidelines Manual, Section 2D1.1, Drug Quantity Table, n. * (Nov. 1989), which states:

> [T]he weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

Guidelines Manual, Section 2D1.1, Application Note 1 (Nov. 1989), which states:

> "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. §841.

STATEMENT OF THE CASE

James Armin Fowner and two co-defendants were charged with a series of drug and gun related offenses in a ten count indictment filed in the United States District Court for the District of New Mexico on November 16, 1989. The government filed a twelve count superseding indictment on January 11, 1990, charging Fowner and his two co-defendants with drug and gun related offenses. The District Court had jurisdiction pursuant to 18 U.S.C. §3231.

Fowner and his co-defendants were arrested on October 15, 1989, by Drug Enforcement Agency agents. The agents seized from Fowner's home laboratory equipment, precursor chemicals, 293 grams of marijuana, and 79.7 grams of methamphetamine, as well as approximately 24 gallons of a liquid mixture. Part of the liquid mixture was found to contain detectable amounts of P2P; the remainder was found to contain detectable amounts of both P2P and methamphetamine.

On February 15, 1990, Fowner entered a plea of guilty to two counts of the superseding indictment: a drug offense under 21 U.S.C. §841(b)(1)(A), which carried a minimum mandatory sentence of ten years imprisonment, and a firearm offense under 18 U.S.C. §924(c)(1), which carried an additional mandatory imprisonment of five years. Under the terms of the plea agreement, the government agreed to dismiss the remaining counts. Due to Fowner's substantial assistance to the government in the prosecution of other cases, the government also promised to file

a motion for downward departure under U.S.S.G. §5K1.1.

In calculating Fowner's base offense level, the Probation Office included the weight of the entire 24-gallon liquid mixture and arrived at a base offense level of 36. The adjusted offense level, after two points were subtracted for acceptance of responsibility, was calculated at level 34. This resulted in a sentencing guideline range, at criminal history level II, of 168-210 months' imprisonment.

Fowner filed an Objection to the Presentence Report and an Addendum to his Objection to the Presentence Report prior to sentencing. He argued that the 24-gallon liquid mixture was uningestable, unmarketable "waste" material which did not fit within the statutory and guideline language referring to "a mixture or substance containing a detectable amount" of a controlled substance. Omission of the 24 gallon "waste" would have resulted in an adjusted offense level of 16 and, at criminal history level II, a sentencing guideline range of 24-30 months.

At a sentencing hearing on his challenge to the guideline calculation in the Presentence Report, Fowner presented the testimony of Dr. Cary Morrow, a chemistry professor at the University of New Mexico. Morrow, who specializes in the area of synthetic organic chemistry, was permitted by the court to testify as an expert in the area of synthetic organic chemistry.

Morrow explained methamphetamine synthesis to the court as a three-step process. Precursor chemicals are first cooked together to form the controlled substance P2P, an oily liquid.

The reaction mixture is then poured into a large volume of water. P2P tends to float to the top of the water, although a small amount of it does dissolve in the water. The chemist removes as much of the floating P2P as possible from the surface of the water. The water, which still contains traces of P2P, is then thrown away as waste material. Morrow testified that, theoretically, more P2P could be salvaged from the waste water, but that such a process would be time-consuming and would require advanced chemical expertise, as well as additional chemicals which were not present at the Fowner property. Morrow opined that the impurity of the finished product recovered by the government in this case indicates that the chemist involved was fairly inept.

The second step in methamphetamine manufacture involves treating the P2P with methylamine and a reducing agent in order to convert it to an oily methamphetamine substance. Morrow testified that "it is very, very rare" for all of the starting materials to be converted in a chemical reaction to form the finished product. A chemist can expect any given chemical conversion to achieve 50 or 60 percent completion. Consequently, a significant amount of the unreacted starting materials will be left behind as waste at the conclusion of the reaction.

The final step entails adding acid to the oily methamphetamine substance in order to convert it to a solid form. The solid material is filtered out of the liquid, which remains as a waste product. Additional methamphetamine could

theoretically have been isolated from the liquid solution found to contain both P2P and methamphetamine, but such a step would be extremely difficult because the P2P inhibits the recovery of the methamphetamine.

Morrow testified that the 24 gallons of liquid were uningestable, and in his opinion, were waste material which would have been thrown away. Waste material results from each of the three steps involved in the manufacture of methamphetamine. The volume and concentration level of liquid waste are not indicative of the amount of methamphetamine manufactured. Morrow testified that there was no way to calculate, from the waste materials found, what the yields of P2P and methamphetamine might have been.

At the conclusion of Morrow's testimony, the court asked for allocution before imposing sentence. Fowner argued that exclusion of the weight of the 24 gallons of liquid would leave him in the position of facing the mandatory ten years on the drug count and five years on the firearm count, prior to consideration of a departure under §5K1.1.

The court ruled that:

> [T]he total weight of the waste mixture containing a detectable amount of a controlled substance will be taken into account in calculating the weight which is considered in arriving at the defendant's base level under the guidelines.

As the court recognized, this ruling obviated the need for a finding of fact as to whether the 24 gallons of liquid were waste:

> I don't know what waste is in the context of this case. We have a solution wherein certain chemicals were found. Whether or not it is waste or not waste is something that I don't think I have to address.

The court sentenced Fowner on the bases of the guideline calculations contained in the Presentence Report. Because of Fowner's substantial assistance to the government, the court departed downward to thirty months on the drug count and imposed a consecutive five-year sentence on the gun count, for a total period of imprisonment of ninety months. The court also imposed a period of supervised release.

Fowner raised the sentencing issue on appeal to the United States Court of Appeals for the Tenth Circuit. That court had jurisdiction pursuant to 28 U.S.C. §1291. The Tenth Circuit upheld the district court's inclusion of the weight of the 24 gallons of liquid and concluded "that a determination of whether the liquid mixture was waste and intended to be discarded need not be made." Accordingly, the Tenth Circuit affirmed the District Court judgment.

ARGUMENT FOR ALLOWANCE OF THE WRIT

THE INCLUSION OF THE WEIGHT OF UNUSABLE LIQUID WASTE IN THE CALCULATION OF DRUG AMOUNTS FOR SENTENCING PURPOSES IS IRRATIONAL, UNJUST AND CONTRARY BOTH TO THIS COURT'S CHAPMAN DECISION AND TO CONGRESSIONAL INTENT. THE CIRCUIT COURTS HAVE REACHED CONFLICTING DECISIONS ON THIS QUESTION AND THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Tenth Circuit, in upholding the District Court's inclusion of the weight of the entire liquid mixture in the calculation of Fowner's sentence, misinterpreted and misapplied §2D1.1 of the United States Sentencing Guidelines. The Tenth Circuit's interpretation of the "mixture or substance containing a detectable amount of the controlled substance" language is contrary to logic, to the policies which prompted the enactment of the sentencing guidelines, and to this Court's decision in Chapman v. U.S., 111 S.Ct. 1919 (1991). The circuit courts have split on the question of whether unusable waste may constitute a "mixture or substance" within the meaning of the sentencing guidelines. This Court should review this case to clearly establish the proper application of §2D1.1 of the Sentencing Guidelines.

§2D1.1 Drug Quantity Table, n *, provides:

> [T]he weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

Application Note 1, from the commentary following §2D1.1, provides:

> "Mixture or substance" as used in this guideline has

the same meaning as in 21 U.S.C. §841.

"Mixture or substance" is not defined in 21 U.S.C. §841. This Court interpreted that language in Chapman. The question presented in that case was whether the weight of the blotter paper used to distribute LSD should be included in the weight of the "mixture or substance containing a detectable amount" of LSD when calculating the sentence of a defendant convicted of distributing LSD.

This Court's analysis of the "mixture or substance" language in Chapman relied heavily on the facts before the Court concerning LSD distribution. Pure doses of LSD involve such an infinitesimal amount of the drug that it must be distributed to retail customers in a "carrier". This Court took note of the methods by which LSD is transferred to blotter paper or gelatin; the paper or gel is then cut into "one-dose" squares which are distributed to consumers. The petitioners in Chapman argued that the weight of the LSD carrier is irrelevant to culpability and should not be included for purposes of sentence computation.

In reaching a decision in Chapman, this Court looked to legislative intent and concluded that "Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes." Id. at 1924.

> The current penalties for LSD distribution originated in the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986). Congress adopted a "market-oriented" approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H.R.Rep. No. 99-845, pt. 1, pp. 11-12, 17 (1986). To implement that

> principle, Congress set mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount of" the various controlled substances, including LSD. 21 U.S.C. §§841(b)(1)(A)(i)-(viii) and (B)(i)-(viii).

Id. at 1925 (emphasis added).

To petitioners' argument that inclusion of the weight of the LSD "carrier" is arbitrary and without a rational basis, this Court responded that it is a rational sentencing scheme to measure drug quantity according to the "street weight" of drugs in the diluted form in which they are sold, rather than according to the net weight of the active component. This results in the assessment of stiffer penalties for distribution of larger quantities of drugs. Although blotter paper is technically not a dilutant, it facilitates distribution of the drug by "mak[ing] LSD easier to transport, store, conceal and sell. It is a tool of the trade for those who traffic in the drug and therefore it was rational for Congress to set penalties based on this chosen tool." Id. at 1928.

The entire premise of this Court's decision in Chapman was that Congress would have intended the weight of the LSD "carrier" to be considered as a "mixture or substance" for sentencing purposes because it is distributed with the drug. Congress' "market-oriented" approach dictates that sentences be assigned in accordance with marketable drug quantities. The greater the quantity involved in drug trafficking, the stiffer the penalty should be.

This logic is inapplicable to waste materials containing

detectable drug amounts. The quantity of waste materials bears no relation to the quantity of distributable drugs. There is no hint in the legislative history of 21 U.S.C. §841 that Congress intended penalties for drug offenses to be commensurate with the quantity of unusable liquid byproducts which were fortuitously discovered prior to disposal.

The circuit courts have reached conflicting decisions on the question of whether the weight of waste materials should be included in the calculation of drug quantities for sentencing purposes. In U.S. v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991), decided subsequent to this Court's decision in Chapman, the Court determined that the weight of an unusable liquid carrier medium containing cocaine should not be included in sentencing calculations. In reaching its decision in Rolande-Gabriel, the Court looked to the policies behind the Sentencing Guidelines.

> The Policy Statement of the Sentencing Guidelines states that "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. [Congress also] sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." [U.S.S.G., Ch. 1, Pt. A], at 1.2 (emphasis added). The Policy Statement goes on to note that the Commission deliberately avoided a system of broad discretion in sentencing ranges because to do so
>
> > would have risked correspondingly broad disparity in sentencing,.... Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.
>
> Id., at 1.3. In order to bring about a coherent system

> of rational and uniform sentencing, the Commission chose to adopt an emperical (sic) method of sentencing. Id.

Rolande-Gabriel, 938 F.2d at 1235.

As the Court pointed out in Rolande-Gabriel, the Sentencing Commission's comment, indicating that "mixture or substance" has the same meaning as it does in 21 U.S.C. §841, conflicts with the policies of rationality and uniformity which the guidelines were adopted to serve. Strict application of the "mixture or substance" language to include the weight of unusable mixtures would result in disparate and irrational sentences.

> This hyper-technical and mechanical application of the statutory language defeats the very purpose behind the Sentencing Guidelines and creates an absurdity in their application: the disparate and irrational sentencing arising out of a "rational and uniform" scheme of sentencing.

Id. The Court concluded that the most rational course was to interpret "mixture or substance" in light of the purposes behind the Sentencing Guidelines in order to achieve "the greatest degree of uniformity and rationality in sentencing." Id.

The Rolande-Gabriel Court distinguished the Chapman decision on the basis that the LSD and other drugs considered in Chapman "were usable, consumable, and ready for wholesale or retail distribution when placed on standard carrier mediums, such as blotter paper, gel, and sugar cubes", while "the cocaine mixture in this case was obviously unusable while mixed with the liquid waste material." Id. at 1237. Furthermore, the standard carrier mediums at issue in Chapman facilitate the marketing of LSD and other drugs, while the liquid waste in Rolande-Gabriel did

nothing to further cocaine distribution. Id. Noting that in the Chapman case, the Supreme Court declined to apply the rule of lenity, the Court held in Rolande-Gabriel that the rule must be applied to the facts of that case in order to avoid a fundamentally absurd result.

> Although it is logical to base sentences upon the gross weight of usable mixtures, it is fundamentally absurd to give an individual a more severe sentence for a mixture which is unusable and not ready for retail or wholesale distribution while persons with usable mixtures would receive far less severe sentences.

Id. The Court therefore vacated the sentence imposed and remanded for resentencing.

The instant case presents stronger facts calling for exclusion of the weight of the unusable mixture than those in Rolande-Gabriel. The unusable mixture in Rolande-Gabriel contained easily recoverable cocaine powder. The unusable liquid seized from the Fowner property was waste which contained detectable drug amounts which could be recovered only with great difficulty or not at all. The liquid in this case was uningestable; that was apparently not the case in Rolande-Gabriel.

The methamphetamine mixture at issue in U.S. v. Jennings, 945 F.2d 129 (6th Cir. 1991), was "cooking" in a crockpot at the time it was seized. The question presented by that case was whether the weight for sentencing purposes should be that of the entire mixture or that of the estimated amount of methamphetamine which would have been produced. The Court concluded that inclusion of the entire weight of the mixture would be illogical

and contrary to the legislative intent underlying the sentencing scheme.

> If the Crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestable byproducts of its manufacture.

Id., at 137. The Court cited Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982), for the proposition that statutory interpretations which produce absurd results must be avoided if there are alternative interpretations consistent with legislative intent. Concluding, however, that the record was not fully developed with respect to the contents of the crockpot, the Court remanded the case for an evidentiary hearing.

In U.S. v. Touby, 909 F.2d 759, 773 (3rd Cir.), aff'd on other grounds, 111 S.Ct. 1752 (1991), the Court recognized the validity of a sentencing distinction between a consumable and marketable drug in which a cutting or distributing agent, or a carrier medium, is found in combination with the drug itself, and a case where what is found is merely unconsumable waste material, bound for the garbage can rather than for the market. The defendant argued in that case that 97% of the 100 gram "slab" containing the designer drug Euphoria contained poisonous ingredients which rendered the substance unconsumable. Although the Third Circuit implied that the rationale of defendant's

position was persuasive, the Court found insufficient facts to support the argument, noting that

> There was no attempt to prove at trial or at the sentencing hearing that these ingredients were manufacturing by-products rather than a "cut" . . . There is no basis in this record to deviate from the general rule that the total weight of the drug should be used for determining the criminal offense level. .

Id., at 773.

In U.S. v. Beltran-Felix, 934 F.2d 1075 (9th Cir.), cert. denied, ___ U.S. ___ (1992), the Court reached a conclusion diametrically opposite to that of the Jennings Court on similar facts. The defendant in Beltran-Felix was "cooking" methamphetamine at the time of his arrest. He argued that the weight of the entire methamphetamine solution should not be considered for sentencing purposes because it was not in a distributable state. The Court declared that it could find no legislative history requiring that "mixture or substance" be interpreted to mean "a [readily marketable] mixture or substance." Id. at 1076. Finding no statutory exemption to the by-products of methamphetamine manufacture, the Court held that it made no difference that the methamphetamine had not yet been processed into its final form. Accordingly, the Court upheld the inclusion of the entire weight of the methamphetamine mixture.

The Fifth Circuit has squarely held that waste materials are to be included in determining the base offense level. In U.S. v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 493 U.S. 983 (1989), the Court determined that the entire weight of a liquid methamphetamine mixture was properly used to calculate the base

offense level, despite recognition of the fact that most of the liquid was waste material. The Fifth Circuit affirmed the Baker holding in U.S. v. Mueller, 902 F.2d 336 (5th Cir. 1990), which raised the same issue concerning the inclusion of the weight of 8.5 gallons of methamphetamine mixture in sentencing calculations. See also, U.S. v. Butler, 895 F.2d 1016 (5th Cir.), cert. denied, 111 S.Ct. 82 (1990).

In U.S. v. Dorrough, 927 F.2d 498 (10th Cir. 1991), the Tenth Circuit upheld the District Court's inclusion of the entire weight of 94 liters of a mixture containing P2P. The Court rejected the defendant's argument in that case that the appropriate weight is the maximum amount of drugs that could be produced from the manufacturing process. In contrast to the instant case, the 94 liters involved in Dorrough was seized before the manufacturing process had been completed. See also, U.S. v. Callihan, 915 F.2d 1462 (10th Cir. 1990) (weight of 94 kilogram mixture used to calculate drug weight when it contained only 95 kilograms of P2P).

While there may be some logic to the inclusion of the entire weight of methamphetamine mixtures seized during the manufacturing process, it is fundamentally absurd to include the weight of garbage mixtures, which bear no relation to drug quantity. Both the Tenth Circuit and the District Court in this case were troubled by the fact that, theoretically, additional controlled substances could be distilled from the liquid waste mixture in this case. However, the unusable byproducts of the

drug manufacturing process will almost always contain detectable amounts of controlled substances. Moreover, the only evidence before the Court on the issue was the testimony of Dr. Morrow, who was unequivocal in his opinion that the liquid mixture was waste material.

The entire scheme of the sentencing guidelines, as they pertain to narcotics cases, entails the imposition of sentences based on the amount of narcotics involved. Sentencing judges are permitted to estimate drug quantity where the amount seized does not reflect the scale of the offense. Guidelines Manual, §2D1.1, comment. (n.12). Such estimates may be based on cash amounts (U.S. v. Hughes, ___ F.2d ___, 1991 WL 270219 (8th Cir. Dec. 20, 1991)); quantity of precursor chemicals (U.S. v. Macklin, 927 F.2d 1272 (2d Cir.), cert. denied, 112 S.Ct. 146 (1991); U.S. v. Evans, 891 F.2d 686 (8th Cir.), cert. denied, 110 S.Ct. 2170 (1990); U.S. v. Andersen, 940 F.2d 593 (1991)); testimony of witnesses as to actual drug purchases (U.S. v. Vazzano, 906 F.2d 879 (2d Cir. 1990)); and the manufacturing capacity of drug laboratories (U.S. v. Putney, 906 F.2d 477 (9th Cir. 1990); U.S. v. Smallwood, 920 F.2d 1231 (5th Cir.), cert. denied, 111 S.Ct. 2870 (1991)). Each of these cases was based upon the premise, embodied in the sentencing guidelines, that the sentence must be proportional to the drug quantity which has been, or could be, produced for distribution.

In this case, there is no rational relationship between the amount of liquid waste and the quantity of marketable drugs which

were, or could have been, produced. The recovery of the liquid mixture in this case was a purely adventitious factor Inclusion of the weight of the 24-gallon mixture to determine the base offense level in this case flies in the face of the sentencing guideline purposes of uniform and rational sentencing.

The statutory and guideline "mixture or substance" language does not encompass waste material which might contain detectable amounts of controlled substance. The holding that waste material is to be treated the same as a cutting agent mixed with a drug works a gross injustice on persons such as Fowner. Such an interpretation of the Anti-Drug Abuse Act produces a result which this Court termed in Chapman as "so 'absurd or glaringly unjust'" as to raise a "reasonable doubt" concerning congressional intent. Id., at 1927 (quoting U.S. v. Rodgers, 466 U.S. 475 (1984) and Moskal v. U.S., 498 U.S. ___, 111 S.Ct. 461 (1990)).

The Tenth Circuit's reading of the "mixture or substance" language has produced an arbitrary result which contravenes the due process of law guaranteed by the Fifth Amendment. See, Chapman, 111 S.Ct. at 1927. In Bolling v. Sharpe, 347 U.S. 497 (1954), this Court held that the due process clause of the Fifth Amendment, which contains no equal protection clause, is violated by federal government action which would violate the equal protection clause of the Fourteenth Amendment if it were state action.

The facts in this case, unlike those presented to this Court in Chapman, call for application of the rule of lenity. As the

Rolande-Gabriel Court declared in the language quoted on page 11, supra, an illogical disparity results from imposition of a more severe sentence on individuals arrested with unusable, unmarketable mixtures than on persons holding distributable drug quantities. The interpretation of the "mixture or substance" language to include unusable waste leads to sentences which are not rationally related to offenses. Further, a divergence in sentences based solely on the weight of unusable waste is not rationally related to the legitimate statutory and guideline goal of reducing drug use by imposing uniform sentences which punish major drug traffickers more severely than minor dealers.

Statutes should be construed to avoid constitutional questions. U.S. v. Albertini, 472 U.S. 675, 680 (1985); U.S. v. Monsanto, 491 U.S. 600 (1989). Unjust and irrational sentences can be avoided either by reading "mixture or substance" to exclude unusable waste materials or by declaring the entire statute unconstitutional. This Court should step in to guide the lower courts on this issue.

The Tenth Circuit's holding in this case "that a determination of whether the liquid mixture was waste and intended to be discarded need not be made" was, in effect, a decision that the weight of waste intended for disposal must be used to calculate the base offense level. Had the Tenth Circuit concluded that waste material intended for disposal should not be considered for sentencing purposes, the Court would obviously have been required to address the question of whether the 24-

gallon mixture constituted such waste. The Tenth Circuit has established a dangerous precedent in this case.

This Court should accept certiorari in this case in order to resolve the grave constitutional issue presented, to settle the conflict between the circuit courts which is epitomized by this case, and to establish the proper application of this Court's holding in Chapman.

CONCLUSION

For the reasons stated above, petitioner James Armin Powner requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES ARMIN FOWNER, Defendant-Appellant.	)	No. 90-2215 (D.C. No. CR 89-489-01 SC) (D.N.M.)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEANNIE L. FOWNER, Defendant-Appellant.	)	No. 90-2223 (D.C. No. CR 89-489-03 SC) (D.N.M.)

ORDER AND JUDGMENT*

Before McKAY and SETH, Circuit Judges, and BROWN, District Judge**.

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**Honorable Wesley E. Brown, United States District Judge for the District of Kansas, sitting by designation.

These are appeals by co-defendants tried under the same indictment. The facts relating to each appeal are the same as are the basic contentions of each defendant.

No. 90-2215

Appellant James Fowner appeals his 30-month sentence under the United States sentencing guidelines following his plea of guilty to one count of manufacturing more than 100 grams of a mixture containing a detectable amount of methamphetamine and aiding and abetting. He claims that the district court applied an incorrect base offense level and violated his rights to due process and equal protection when it included waste materials containing detectable amounts of P_2P in calculating his sentence under U.S.S.G. § 2D1.1. We affirm.

Appellant and two co-defendants were charged with a series of drug and gun related offenses under a twelve-count superseding indictment. Appellant pled guilty to Counts III and VIII of the superseding indictment. Count III, which is the focus of this appeal, charged appellant with manufacturing more than 100 grams of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and aiding and abetting, in violation of 18 U.S.C. § 2. Count VIII charged appellant with carrying and using a firearm to facilitate the drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). Appellant does not appeal the mandatory term of five years' imprisonment that he received for Count VIII.

In exchange for appellant's pleas of guilty to Counts III and VIII of the superseding indictment, the government agreed to dismiss the remaining counts. Because of appellant's substantial assistance to the government in the prosecution of other cases, the government further agreed to file a motion for downward departure under U.S.S.G. § 5K1.1.

At the time of his arrest, appellant was operating a methamphetamine laboratory on his property. 293 grams of marijuana, 79.7 grams of methamphetamine and two semi-automatic pistols were seized. In addition to the controlled substances, approximately 24 gallons of a liquid mixture containing detectable amounts of P_2P were recovered.

In its calculation of appellant's base offense level, the Probation Office included the firearms, the controlled substances and the weight of the entire 24-gallon mixture, which resulted in a base offense level of 36. This figure was reduced by two points for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. With a base offense level of 34 at criminal history category II, the sentencing guideline range was 168-210 months' imprisonment.

Appellant objected to the Probation Office's inclusion of the weight of the entire 24-gallon mixture because he claimed it was "waste" material which was not meant to be ingested or sold. If the 24 gallons were omitted, he argued that his base offense level, with the adjustment for acceptance of responsibility, should be 16. With a criminal history category of II, his sentencing guideline level would be 24 to 30 months.

At sentencing, the district court noted his objection and heard testimony on the issue of "waste" from Dr. Cary Morrow, a chemist. Dr. Morrow testified that in his opinion, the 24 gallons of liquid was waste but conceded that additional P_2P could be recovered if the solution was left to settle or reprocessed with additional chemicals. At the conclusion of Dr. Morrow's testimony, the district court stated that:

> "The definition of quote, waste, end quote, is something that troubles me because in the concept of, any concept of waste, I assume economic considerations enter into it, or maybe even other considerations. Some people might throw away as waste an item where other people would not consider it waste and so on, ...
>
> . . . .
>
> "I don't know what waste is in the context of this case. We have a solution wherein certain chemicals were found. Whether or not it's waste or not waste is something that I don't think I have to address."

Vol. III at 52-53. In rejecting appellant's argument and concluding that the weight of the entire liquid mixture must be included for purposes of sentencing, the district court relied on the commentary to U.S.S.G. § 2D1.1 and two Fifth Circuit cases. See United States v. Mueller, 902 F.2d 336 (5th Cir.) (entire weight of mixture containing detectable amounts of the methamphetamine was properly included for purposes of sentencing); United States v. Butler, 895 F.2d 1016 (5th Cir.) (same).

In sentencing appellant, the district court acknowledged that with a base offense level of 34 at a criminal history category of

II, appellant's sentencing guideline was 168-210 months. Because the government had filed a motion for downward departure under U.S.S.G. § 5K1.1, however, the district court sentenced appellant to a term of 30 months' imprisonment.

In his brief, appellant concedes that the 30-month imprisonment term falls within the guideline range that he contends is applicable for his offense; however, he submits that the district court should have considered the motion for a downward departure from the 24- to 30-month guideline range rather than the 168-210 months' guideline range.

On appeal, appellant challenges the district court's inclusion of the 24-gallon liquid mixture in the calculation of his base offense level. He claims that the term "mixture or substance" referred to in the commentary accompanying U.S.S.G. § 2D1.1 does not contemplate the inclusion of waste materials containing detectable amounts of a controlled substance and such an application is contrary to the Congressional intent of a "market-oriented" approach in setting punishments. We review a challenge to the district court's interpretation of the sentencing guidelines de novo. United States v. Agbai, 930 F.2d 1447, 1448 (10th Cir.).

Pursuant to the sentencing guidelines, the base offense level is calculated from the Drug Quantity Table found in § 2D1.1(c). In interpreting and applying the sentencing guidelines, we consider the commentary to be essential. United States v. Rutter,

897 F.2d 1558, 1561 (10th Cir.). The commentary to U.S.S.G. § 2D1.1 provides:

> "The scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity."

U.S.S.G. § 2D1.1. We have held that for purposes of sentencing under the Drug Quantity Table, the weight of the mixture containing a controlled substance is the entire amount of the mixture. See United States v. Callihan, 915 F.2d 1462, 1463 (10th Cir.).

In United States v. Dorrough, 927 F.2d 498 (10th Cir.), we were presented with a similar issue. In Dorrough, the police seized 94 kilograms of an amphetamine mixture before the manufacturing process had been completed. At sentencing, the defendant presented evidence that the most P_2P which could have been produced from the liquid seized was 8.85 kilograms. Dorrough argued that only the 8.85 kilograms should have been considered in calculating his sentence and that the remaining liquid from the manufacturing process was "waste." Finding support in the commentary to U.S.S.G. § 2D1.1, we held that the district court properly considered the weight of the entire 94 kilograms because the mixture contained a detectable amount of P_2P. Id. at 502.

We agree with the district court and conclude that a determination of whether the liquid mixture was waste and intended

to be discarded need not be made. Such an interpretation would require needless speculation which is not contemplated by the sentencing guidelines. In this case, the evidence showed that there was a detectable amount of P_2P in the 24-gallon liquid mixture. Under U.S.S.G. § 2D1.1 and the above-cited case law, so long as the mixture contains a detectable amount, the entire weight of the mixture is included for purposes of calculating the base offense level. Therefore, we find that the district court properly included the weight of the entire 24-gallon liquid mixture for purposes of sentencing appellant.

Appellant's attempt to distinguish Dorrough from the present case is unpersuasive. Appellant argues that in Dorrough the weight of the entire mixture was properly included because the manufacturing process had not been completed when the liquid was seized. In his case, however, appellant claims that the manufacturing process was complete and the remaining mixture was "waste"; therefore, the weight of the entire liquid mixture should not be included. We reject his argument for the following reasons.

First, we are not convinced that the manufacturing process was complete or that the 24-gallon liquid mixture constituted "waste." As the district court correctly pointed out, the concept of waste is not easily defined. Although we can only speculate as to why appellant would have kept over 24 gallons of liquid which was allegedly "waste" material, we are mindful of the chemist's

testimony that if the mixture was allowed to settle, additional P_2P could be recovered.

The chemist also testified that it would be possible to extract more P_2P from the liquid mixture if the chemist was skilled and possessed the proper chemicals. Although the chemicals required were not present in appellant's laboratory at the time of the seizure, we cannot eliminate the possibility that he was intending to either purchase the additional chemicals and attempt to perform the process himself or sell the remaining liquid mixture to a chemist with the proper chemicals. While this is sheer conjecture on our part, appellant's argument would have the district court perform this same analysis in determining whether the mixture or substance seized was intended for consumption or disposal.

Based upon the chemist's testimony, the manufacturing process was not necessarily complete at the time of the seizure. Therefore, appellant was in essentially the same position of the manufacturing process as Dorrough and the facts of the two cases become indistinguishable.

Lastly, appellant would have us differentiate the two cases on the timing of the seizure in relation to the manufacturing process. We do not believe that the timing of the seizure should dictate the severity of the sentence and conclude that the adoption of such a distinction would create greater disparities among sentences.

Although we agree with appellant that Congress created the Anti-Drug Abuse Act intending to employ a "market-oriented" approach in setting punishments, United States v. Mendes, 912 F.2d 434, 439 (10th Cir.), his argument of marketability is foreclosed by our findings above. Appellant could have skimmed additional P_2P off the top of the liquid mixture, reprocessed the liquid mixture, or sold the entire liquid mixture to a chemist capable of reprocessing the liquid mixture. Given the potential saleability of the entire liquid mixture or at least part of it, we cannot say that the inclusion of the weight of the entire mixture was contrary to the "market-oriented" approach intended by Congress.

Appellant also makes a constitutional challenge to the district court's inclusion of the weight of the entire liquid mixture. He claims that the waste material does not fit within the definition of any "mixture or substance containing a detectable amount"; therefore, it violates the Fifth Amendment guarantees of due process and equal protection.

Based upon our findings above and for the reasons articulated in United States v. Baker, 883 F.2d 13, 15 (5th Cir.), we conclude that the inclusion of the total weight of the mixture is reasonably related to a legitimate governmental interest and not violative of the Fifth Amendment.

Accordingly, the judgment of the District Court for the District of New Mexico is AFFIRMED.

No. 90-2223

Appellant Jeannie Fowner appeals from her sentence of five years' probation under the United States sentencing guidelines following her plea of guilty to one count of manufacturing more than 100 grams of a mixture containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). She claims that the district court applied an incorrect base offense level and violated her rights to due process and equal protection when it included waste materials containing detectable amounts of P_2P in calculating her sentence under U.S.S.G. § 2D1.1. We affirm.

Appellant was indicted along with two co-defendants in a twelve-count superseding indictment alleging various drug trafficking and firearm violations. In exchange for her plea of guilty to Count III, the remaining counts were dismissed. Because of appellant's substantial assistance to the government in the prosecution of other cases, the government agreed to file a motion for downward departure under U.S.S.G. § 5K1.1.

At the time of her arrest, appellant was involved in the operation of a methamphetamine laboratory located on her property and co-defendant's. 293 grams of marijuana, 79.7 grams of methamphetamine and two semi-automatic weapons were seized. In addition to the controlled substances, approximately 24 gallons of a liquid mixture containing detectable amounts of P_2P were recovered.

In its calculation of appellant's base offense level, the Probation Office included the two firearms, the controlled substances and the weight of the entire 24-gallon liquid mixture in reaching a base offense level of 36. This figure was reduced by two points for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. Although the firearms were found on her property, the Probation Office recommended a two-point reduction because she did not have possession of the firearms at the time of the arrest. With a base offense level of 32 at criminal history category I, the sentencing guideline range was 121-151 months. The statutory minimum for this offense is ten years' imprisonment.

Appellant objected to the Probation Office's inclusion of the entire 24-gallon liquid mixture contending that it was "waste" product. At the sentencing hearing, the district court noted her objection and heard testimony on the issue of "waste" from Dr. Cary Morrow, a chemist. At the conclusion of Dr. Morrow's testimony, the district court rejected appellant's argument and concluded that the weight of the entire liquid mixture must be included for purposes of sentencing under U.S.S.G. § 2D1.1.

In sentencing appellant, the district court recognized that the guideline range was 121-151 months; however, it granted the government's motion for a downward departure and sentenced appellant to a five-year term of probation with certain conditions.

On appeal, appellant challenges the district court's inclusion of the weight of the 24-gallon liquid mixture in the

calculation of her base offense level. She claims that the term "mixture or substance" referred to in the commentary accompanying U.S.S.G. § 2D1.1 does not contemplate the inclusion of waste materials containing detectable amounts of a controlled substance. Such an application, she argues, is contrary to the Congressional intent of a "market-oriented" approach in setting punishment and is violative of the Fifth Amendment.

Before reviewing the merits, we must address the government's contention that we are without jurisdiction to entertain this appeal. Appellant invokes 18 U.S.C. § 3742(a) as the jurisdictional basis for this appeal. The government claims that we lack jurisdiction because appellant's appeal does not fit within any of the four subsections under 18 U.S.C. § 3742(a) and there is no way to logically challenge the district court's calculations which led to the probated sentence. We disagree.

18 U.S.C. § 3742(a) provides that a defendant may appeal a sentence only if it:

> "(1) was imposed in violation of law;
>
> "(2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> "(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range or includes a more limiting condition of probation . . .; or
>
> "(4) was imposed for an offense for which there is no sentencing guideline . . . ."

18 U.S.C. § 3742(a). It is clear from appellant's claim of error that she is challenging the district court's interpretation and application of the guidelines; therefore, subsection (2) gives us jurisdiction.

While it is true that appellant was only sentenced to a term of probation with no incarceration, the Sentencing Reform Act recognizes probation as a sentence in itself. U.S.S.G., Ch.7, Pt.A, 2(a) (citing 18 U.S.C. § 3561). Appellant would be placed in an unusual situation if the district court subsequently finds that she violated the conditions of her probation. If this occurs, the district court has the following options: it "may continue probation, with or without extending the term or modifying the conditions, or revoke probation and impose any other sentence that initially could have been imposed." Id.

Unless appellant violates her probation, the guideline range of her offense may not now be significant. However, since the possibility exists that she may violate her probation and the district court decides to revoke her probation and impose sentence, we must on this appeal review her claim to ensure that the guideline range was appropriately calculated.

The evidence showed that there was a detectable amount of P_2P in the 24-gallon mixture. See discussion, above, in No. 90-2215. Under U.S.S.G. § 2D1.1, so long as the mixture contains a detectable amount, the entire weight is included for purposes of calculating the base offense level. With a base offense level of

32 at criminal history category I, the sentencing guideline range is 121-151 months.

For the reasons articulated in United States v. Powner, No. 90-2215, we conclude that appellant's guideline range of 121-151 months was appropriately calculated and not violative of the Fifth Amendment.

Accordingly, the judgment of the District Court for the District of New Mexico is AFFIRMED in this appeal.

Entered for the Court

Oliver Seth
Circuit Judge

same request, Ms. Garza?

MS. GARZA: Yes, your Honor.

THE COURT: All right. On the so-called, quote, waste, end quote, issue presented this morning, I will find the issue against the defendants. That is, I will follow Fifth Circuit authority, United States v. Mueller, 902 F.2d 336, United States v. Butler, 895 Federal 1016. That indicates that the total weight of the waste mixture containing a detectable amount of a controlled substance will be taken into account in calculating the weight which is considered in arriving at the defendant's base level under the guidelines.

The definition of quote, waste, end quote, is something that troubles me because in the concept of, any concept of waste, I assume economic considerations enter into it, or maybe even other considerations. Some people might throw away as waste an item where other people would not consider it waste and so on, but I feel that under the mandates of the guidelines themselves, that is the footnote -- let me see if I can find that.

The footnote to the Sentencing Guidelines Drug Quantity Table is pretty specific on it. That states, "consistent with the provisions of the Anti Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture

or compound shall be considered in measuring the quantity, end quote, for purposes of application of the guidelines, and I feel that that is the appropriate approach, and apparently that is the approach that the Fifth Circuit has taken in the two cases that I cited, and that's the approach that I'm going to take in this case.

MS. STORCH: Your Honor, then I take it, then, in terms of at least a factual basis, because you're citing the Fifth Circuit authority that does find waste material is counted and calculable under the guidelines.

THE COURT: I'm not accepting your definition -- Let me interrupt here. I'm not accepting your definition, or your understanding, or the witness' understanding of quote, waste, end quote, material. That definition as you are trying to have me accept is not acceptable to me.

I don't know what waste is in the context of this case. We have a solution wherein certain chemicals were found. Whether or not it's waste or not waste is something that I don't think I have to address.

MS. STORCH: Your Honor, the witness clearly defined, even if it was his opinion, he clearly testified that even if it was his opinion it was waste, that it was nevertheless the by-product or the leftovers of a chemical manufacturing process.

THE COURT: You've made your record, and I have

indicated to you what my ruling is. We can go to the next step in this proceeding.

MS. STORCH: Your Honor, the next step, then, is request for a downward departure based upon the fact that these materials, in fact, are what I characterize as waste or by-product and --

THE COURT: I'm not going to take -- excuse me for interrupting. We can move along here a little bit faster. I am not going to engage in a downward departure based upon a consideration that these materials were what you characterized as quote, waste, end quote. I will consider a downward departure based upon the cooperation of these individuals in another case.

MS. STORCH: Okay. And, your Honor, again not to be rude, is your unwillingness to engage in a downward departure because this other motion exists, or is it because the guidelines say that these sorts of materials get weighed in?

THE COURT: I am not going to -- I'll tell you. I'm going to engage a downward departure, and when I announce to you the extent of that I will cite my reason for it and everything else I will not have considered. Now, are we ready?

MS. STORCH: Yes, your Honor.

THE COURT: All right. Ms. Garza.

relative sentences in the cases, the relative culpabilities in the cases and the fact that my client gave a great deal of very important assistance to the government.

THE COURT: All right. On September the 12 in Santa Fe, I had indicated what I was going to do in the case of Mr. Fowner, and I will tell you quite frankly that that was based on a misapprehension that I had concerning the authority that I had to depart downward.

I have not done too many, if any, downward departure sentences since the guidelines, since Sentencing Reform Act came into effect, but I am going to depart downward. I have indicated already my ruling on the quote, waste, end quote, issue, and I will abide by that.

So I am going to find that there is no further need for an evidentiary hearing as there are no disputed facts. I will find that the offense level is 34, and the criminal history category is two, establishing a guideline and imprisonment range of 168 to 210 months.

The Court, in imposing sentence, takes judicial notice that the defendant, James Armon Fowner, was involved in the conspiracy to manufacture a large

amount of methamphetamine. Further the offense conduct involved the presence of a firearm. I will note, the Court will note that count eight requires the imposition of a five-year sentence, which must be served consecutively to the guideline sentence.

I will find further that this defendant, as revealed by a letter from Ms. Tara Neda dated July the 17, 1990 -- is that the last communication I had from you on cooperation.

MS. NEDA: It is, Your Honor.

THE COURT: All right. That this defendant has cooperated with the government substantially, just in finding a downward departure from the sentence to be imposed under count three, Number 5K-1.1.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that as to count one of the superceding indictment, the count on which I am departing downward, the defendant James Armon Fowner, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a period of 30 months.

As to count eight, defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months. This last

sentence will be served consecutively with the sentence imposed on count one.

Upon release from confinement, the defendant shall be placed on supervised release for a term of five years as to count three, and three years as to count eight, these to run concurrently one with the other. Within 72 hours of release from custody, the defendant shall report in person to the U.S. Probation Office in the district of which he is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall not possess illegal controlled substances and shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990.

In the following special conditions one, the defendant shall not possess firearms, explosives or other dangerous weapons. Defendant shall participate as directed in a program approved by the United States probation office for substance abuse, which program includes testing to determine whether the defendant has reverted to the use of drugs or alcohol.

Based upon the defendants' lack of financial

resources, the Court will not impose a fine or an additional fine of which would pay government costs of any imprisonment, probation or supervised release.

It is further ordered that this defendant shall pay to the United States a special assessment in the amount of $50 as to count three and $50 as to count eight, for a total of $100. It shall be due immediately and payable by cashiers check, bank or postal money order to the United States District Court Clerk and mailed to P.O. Box 689, Albuquerque, New Mexico 87103.

It is their request that the defendant be permitted to surrender voluntarily?

MS. STORCH: Yes, Your Honor. I would like to ask the Court to allow him to voluntarily surrender no sooner than 60 days because of at least two major reasons: One being that the probation department is going to need to do extra work in finding a facility where he can safely be sent to.

I had spoken with Anita Hogan about it and I understand there is a special procedure that the Bureau of Prisons engages in in a situation where someone like my client has, in fact, testified and cooperated with the government to insure his

security.

Secondly, both my clients -- I mean -- excuse me. Both my client and his wife, if they are both sentenced to prison, are going to need to make arrangements financially and legally for their children. And I think that 60 days is a period of time that they would need in order to do that.

THE COURT: What plans are being made to take care of the children?

MS. STORCH: I think that I am not quite clear on it. They are living out in Fence Lake, New Mexico, next to my client's parents, and I am uncertain whether the parents or some of the in-laws who live in the Albuquerque area are going to be capable of taking --

THE COURT: In-laws. You mean Mrs. Fowner's parents?

MS. STORCH: I am not quite sure where Mrs. Fowner's parents live.

THE COURT: What do you mean, in-laws?

MS. STORCH: In-laws being my client's brothers. My client's father lives in Albuquerque. There are a number of relatives that live in New Mexico.

THE COURT: Okay.

MS. STORCH: Also, Your Honor, I would like to ask that the Court release Mr. Fowner or set a release pending appeal. I would file in open court a motion for release pending appeal. The appeal issue being the weighing in of the waste material. And if I had a black pen, I would fill in that he had been sentenced to seven and a half years. But I would like to file that in open court at this time. And I believe --

THE COURT: You have not filed your appeal yet?

MS. STORCH: I will be filing an appeal on behalf of Mr. Fowner.

THE COURT: Mr. Fowner, if I should comply with your counsel's request that you be permitted to surrender voluntarily, would you assure this Court that you will surrender yourself voluntarily at a time and place to be set by the Bureau of Prisons?

MR. FOWNER: Yes, sir.

THE COURT: All right. Mr. Fowner, pursuant to 18 United States Code section 3742, you have the right to appeal the final sentence of this Court within 10 days of the entry of judgment imposed for an offense for which a sentencing guideline has been issued by the sentencing commission, pursuant to

28 United States Code section 994, subsection 1. You have a right to apply for leave to appeal in forma pauperis if you are unable to pay the cost of an appeal.

MR. FOWNER: Yes, sir.

THE COURT: All right. Anything further in this case at this time?

MS. NEDA: The government needs to dismiss some counts, Your Honor.

MR. WEGER: Did Your Honor make a ruling on the surrender date? I didn't hear it.

THE COURT: On the what?

MR. WEGER: On the surrender date.

THE COURT: Yes. I am going to order that. I will order that the surrender date be not sooner than November the 15, 1990.

MS. NEDA: Your Honor, in indictment 89-489SC, the government would dismiss the remaining counts as to James Armon Fowner, according to the memorandum of understanding.

THE COURT: The motion will be granted.

MS. STORCH: Thank you, Your Honor. And then you will be ruling on a later date on my motion for release pending appeal?

THE COURT: I will go ahead and order that

he be released pending appeal. After you find the release, just present the order up there. As I understand it should be filed.

I might say that these sentencing guidelines and the way they operate provide the government and counsel for defendants and the Court, at least offer the opportunities to do a lot of game playing and a lot of exotic maneuvering and so on. It just makes it terribly, terribly difficult to handle cases in a straightforward, head-on fashion in many cases. Please be seated.

Before you leave the courthouse, you should consult with our probation officer, Mr. Fowner.

MR. FOWNER: Yes, sir.

THE COURT: Please come forward, Ms. Fowner.

I don't know if I asked you previously, but if I did, just to make certain, I will ask you at this time, is there any legal reason that you can cite to the Court as to why sentence should not be pronounced?

MS. GARZA: No, Your Honor.

THE COURT: Is there any statement that you or your client wished to make in mitigation of punishment, or is there any other statement which you